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James v Government of Malaysia

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3(2)–24–02 OF 2006
MOHAMAD ARIFF J
7 DECEMBER 2009

C *Civil Procedure — Pleadings — Striking out — Jurisdiction — Conversions out of Islam — Whether High Court has jurisdiction to hear apostasy application — Whether jurisdiction exclusive to Shariah courts — Whether suit filed in High Court to be struck out under O 18 r 19(1)(d) of the Rules of the High Court 1980*

D *Constitutional Law — Courts — Jurisdiction of High Court — Conversions out of Islam — Whether High Court has jurisdiction to hear apostasy application — Whether jurisdiction exclusive to Shariah Courts — Federal Constitution art 121(1A)*

E *Islamic Law — Apostasy — Renunciation of Islam — Conversions out of Islam — Jurisdiction of Shariah courts to deal with conversions out of Islam — Whether civil courts seized with jurisdiction to deal with conversions out of Islam — Federal Constitution art 121(1A)*

F *Islamic Law — Shariah court — Jurisdiction — Conversions out of Islam — Jurisdiction of Shariah courts to deal with conversions out of Islam — Whether right to affirm or declare faith in another religion subject to Shariah laws — Whether such jurisdiction exclusive to Shariah courts — Federal Constitution* G *art 121(1A)*

This suit was essentially an action to renounce the religion of Islam by the plaintiff who was born to Muslim parents but claimed he had been practising Christianity since his secondary school days. That being so, the plaintiff argued H he could not be regarded in law as a person 'professing' the religion of Islam and thus could not be made subject to the Administration of Islamic Law (Federal Territories) Act 1993. The plaintiff prayed for a declaration accordingly. The senior assistant registrar had dismissed the application by the defendant to strike out the plaintiff's originating summons under O 18 r 19(1)(d) of the I Rules of the High Court 1980 on the ground of abuse of process. Hence this appeal.

Held, allowing the appeal:

(1) The plaintiff by his action sought to declare almost the entire definition

of 'Muslim' under the Administration of Islamic Law (Federal Territories) Act 1993 invalid, except for para (a) which refers to a person who 'professes' the religion of Islam. The relief claimed by the plaintiff, although couched as a broad declaration of invalidity as a matter of constitutional interpretation (for which in principle the civil courts have jurisdiction), the subject matter was apostasy, and the determination of a matters of Islamic law, which are within the exclusive jurisdiction of the Shariah courts by virtue of art 121(1A) of the Federal Constitution (see paras 6 & 10).

(2) Clear pronouncements of the Federal Court have stated very firmly that apostasy is a matter within the exclusive jurisdiction of the Shariah courts; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 referred (see para 11).

(3) The decision in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 cannot be read as diluting or overruling *Lina Joy*'s case. It merely says art 121(1A) is not meant to exclude the jurisdiction of the civil court, where such jurisdiction exists. If a federal law is constitutional, and that is a matter for the civil court to decide, the jurisdiction is not ousted just because there might be a competing claim to jurisdiction by a Shariah Court. Where a subject matter is clearly something within the Shariah Court jurisdiction (apostasy; determination who is a Muslim), the issue of the civil court having the jurisdiction to decide on constitutionality does not arise (see para 13).

(4) This was a clear case of allowing the defendant's application under O 18 r 19(1)(d). The plaintiff's case was obviously unsustainable and warranted striking out. The court was obviously bound by the clear ruling in *Lina Joy* as a matter of judicial precedent (see para 14).

[Bahasa Malaysia summary

Tindakan ini pada mulanya tindakan untuk meninggalkan agama Islam oleh plaintif yang dilahirkan oleh ibu bapa Islam tetapi mendakwa dia telah mengamalkan agama Kristian semenjak sekolah menengah lagi. Dengan itu, plaintif berhujah bahawa dia tidak boleh dikatakan dari segi undang-undang sebagai seorang yang 'professing' agama Islam dan oleh itu tidak boleh disubjekkan kepada Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 ('Akta'). Plaintif memohon untuk perisytiharan sewajarnya. Timbalan pendaftar kanan telah menolak permohonan oleh defendan untuk membatalkan saman pemula plaintif di bawah A 18 k 19(1)(d) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan penyalahgunaan proses. Maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Plaintif melalui tindakannya memohon untuk mengisytiharkan hampir

kesemua definisi 'Muslim' di bawah Akta adalah tidak sah, kecuali untuk perenggan (a) yang merujuk kepada seseorang yang 'professes' agama Islam. Relief yang dituntut oleh plaintif, walaupun diungkapkan sebagai perisytiharan luas ketaksahan sebagai perkara tafsiran perlembagaan (yang mana mengikut prinsip mahkamah sivil mempunyai bidang kuasa), perkara subjek adalah murtad, dan penentuan perkara-perkara undang-undang Islam, yang dalam bidang kuasa ekslusif Mahkamah Shariah mengikut perkara 121(1A) Perlembagaan Persekutuan (lihat perenggan 6 & 10).

(2) Pengumuman jelas Mahkamah Persekutuan telah menyatakan secara teguh bahawa kemurtadan adalah perkara dalam bidang kuasa eksklusif Mahkamah-Mahkamah Shariah; *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 dirujuk (lihat perenggan 11).

(3) Keputusan dalam kes *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 tidak boleh dibaca sebagai melemahkan atau menolak kes *Lina Joy*. Ia hanya menyatakan perkara 121(1A) bukan bermaksud untuk mengecualikan bidang kuasa mahkamah sivil, di mana wujud bidang kuasa. Jika undang-undang persekutuan adalah berpelembagaan, dan adalah perkara untuk mahkamah sivil untuk memutuskan, bidang kuasa tidak disingkirkan hanya kerana mungkin terhadap tuntutan bersaing kepada bidang kuasa Mahkamah Shariah. Di mana perkara subjek adalah jelas sesuatu yang dalam bidang kuasa Mahkamah Shariah (murtad, penentuan siapa seorang Islam) isu mahkamah sivil mempunyai bidang kuasa untuk memutuskan atas keperlembagaan tidak berbangkit (lihat perenggan 13).

(4) Ini adalah kes jelas yang membenarkan permohonan defendan di bawah A O 18 k 19(1)(d). Kes plaintif secara jelas tidak kukuh dan mewajarkan pembatalan. Mahkamah jelas terikat dengan perintah jelas dalam kes *Lina Joy* sebagai perkara duluan kehakiman (lihat perenggan 14).]

Notes

For a case on jurisdiction of High Court, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2247.

For cases on jurisdiction, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 766–733.

For cases on renunciation of Islam, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 552–553.

For cases on striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6203–6324.

Cases referred to

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585, FC (folld)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 s 2(1), 2(1)(a), (b)

Federal Constitution arts 4, 121(1A), Ninth Schedule, List I, para 6(e), List II, para 1

Rules of the High Court 1980 O 18 r 19(1)(d)

K Shanmuga (Kanesalingam & Co) for the applicant.
Effendy Nazila (Noor Hisham bin Ismail with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Mohamad Ariff J:

[1] This was an appeal from the decision of the senior assistant registrar who had dismissed the application by the Government of Malaysia ('the defendant') to strike out the plaintiff's originating summons under O 18 r 19(1)(d) on the ground of abuse of process. I allowed the appeal and ordered that the originating summons be struck out on this ground with costs.

[2] The senior federal counsel submitted this present action was essentially an action to renounce the religion of Islam by the plaintiff who was born to Muslim parents but claimed he had been practising Christianity since his secondary school days. That being so, the plaintiff argued he could not be regarded in law as a person 'professing' the religion of Islam and thus could not be made subject to the Administration of Islamic Law (Federal Territories) Act 1993. The plaintiff's prayer for a declaration, explained below, had to be assessed in this context.

[3] I agreed with the senior federal counsel's submission that the essential subject matter of this action was renunciation of the religion of Islam or apostasy (*irtidad* or *murtad*), and as such was a matter within the exclusive jurisdiction of the Shariah courts by virtue of art 121(1A) of the Federal Constitution. In pith and substance, the plaintiff's action was an action to acknowledge him as a person who had left the religion of Islam, although born a Muslim.

[4] This action was commenced as an originating summons purportedly for one broad declaration, as spelt out therein:

> the definition of a 'Muslim' in section 2 of the Administration of Islamic Law (Federal Territories) Act 1993, except for definition (a), is inconsistent with and/or contrary to the 9th Schedule, List II, paragraph 1 of the Federal Constitution read

A together with List I, Paragraph 6(e) and/or Article 8(2) and/or 11 of the Federal Constitution and is therefore null and void in accordance with Article 4 of the Federal Constitution.

B **[5]** It is necessary to appreciate and note the full provision of s 2(1) of the 1993 Act, in order to conclude whether the plaintiff's claim was an abuse of process. I quote the entire section below:

Muslim' means —

C (a) a person who professes the religion of Islam;

(b) a person either or both of whose parents were, at the time of the person's birth, Muslims;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

D (d) a person who has converted to Islam in accordance with the requirements of section 85;

(e) a person who is commonly reputed to be a Muslim; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim whether the statement be verbal or written.

E

[6] The plaintiff by his action sought to declare almost the entire definition of 'Muslim' under the Act invalid, except for para (a) which refers to a person

F who 'professes' the religion of Islam. The only relevant paragraph in his case is para (b) and yet the net is cast wide. The logical flow of the plaintiff's argument starts with the reference to 'persons professing the religion of Islam: in para 1 of the State List (List II of the Ninth Schedule). In brief, this constitutional provision provides that a State Legislature can make laws, inter alia, on 'Islamic

G law', 'the creation and punishment of offences of persons professing the religion of Islam', 'the constitution, organisation and procedure of Syariah Courts which shall have jurisdiction only over person professing the religion of Islam', and 'the determination of matters of Islamic law'.

H **[7]** Granted that the term 'professing' is not explicitly defined, this feature of the Federal Constitution cannot, in my view, be a ground and a reason to narrow the breadth of the relevant constitutional proviso in this connection, namely para 1 of the State List (List II of the Ninth Schedule). It is obvious that the subject matter belonging to a State Legislature includes the determination

I of matters of Islamic law, and on its wording there is no similar qualification of 'over person professing the religion of Islam'.

[8] It is an accepted principle of constitutional interpretation that a constitutional must be read broadly consistent with its status as an organic law.

[9] In relation to the powers vested in relation to the Federal Territories, these expansive provisions are imported to the 'Government and administration of the Federal Territories' through List I, para 6(e) of the Ninth Schedule.

[10] As stated earlier, the relief claimed by the plaintiff, although couched as a broad declaration of invalidity as a matter of constitutional interpretation (for which in principle the civil courts have jurisdiction), the subject matter is apostasy, and the determination of a matters of Islamic law, which are within the exclusive jurisdiction of the Shariah courts by virtue of art 121(1A) of the Federal Constitution, which bears repeating:

> (1A) The courts referred to in Clause (1) [the Civil Courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[11] Clear pronouncements of the Federal Court have stated very firmly that apostasy is a matter within the exclusive jurisdiction of the Shariah courts. The decision in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, is crystal clear on this issue. Although counsel for the plaintiff attempted to suggest there had been a subsequent qualification of *Lina Joy* by the Federal Court in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, I did not believe this was a correct reading of *Latifah bte Mat Zin*. In *Lina Joy* it was said:

> … Justeru itu Mahkamah Persekutuan berpendapat bahawa adalah sejajar dengan logik untuk Mahkamah Syariah, yang telah dengan jelasnya diberi bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan pemelukan agama Islam adalah, secara implikasi perlu, juga mempunyai bidang kuasa untuk mengadili perkara-perkara yang berkaitan dengan keluarnya seorang Muslim dari agama Islam atau kemurtadan. Saya tidak nampak sebarang kecacatan dalam taakulan penghakiman Mahkamah Persekutuan itu. Oleh demikian saya tiada lain pilihan melainkan menjawab soalan ketiga itu dengan mengatakan bahawa kes *Soon Singh* telah diputuskan dengan betul.
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> Seperti yang telah dihuraikan di perenggan sebelum ini, kes *Soon Singh* ketara menunjukkan bahawa hal murtad adalah dalam bidang kuasa Mahkamah Syariah. Di perenggan (10) saya juga telah merujuk kepada item 1, Senarai 2, Jadual 9 Perlembagaan bagi menunjukkan bahawa perkataan penting yang digunakan di situ ialah 'matters' dan kerana 'Islamic Law' adalah salah satu daripada 'matters' yang terdapat dalam item 1 itu dan apabila dibaca pula berlatarbelakangkan kes *Dalip Kaur maka amat ketara sekali bahawa sesungguhnya perkara murtad itu adalah perkara yang berhubung-kait dengan undang-undang Islam (Islamic law) dan nyatalah oleh itu ianya adalah di dalam bidangkuasa Mahkamah Syariah dan kerana perkara 121(1A) Perlembagaan. maka Mahkamah-mahkamah Sivil tidak boleh campur tangan dalam hal itu*. (Emphasis added.)

[12] In *Latifah bte Mat Zin*:

> [50] Something should be said about cl (1A) of art 121. This clause was added by Act A704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article *The Amendment of art 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law* [1989] 2 MLJ xvii:
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> > *One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before.* For example, in *Myriam v Mohamed Ariff* …
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> [51] Prior to the establishment of the Shariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the civil courts. Then the Shariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in *Myriam v Mohamed Arif*, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.
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> [52] Actually if laws are made by Parliament and the Legislatures of the states in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the Shariah Court. But, these are two distinct issues, one falls within the jurisdiction of the civil court and the other falls within the jurisdiction of the Shariah Court. Still, there is a clear division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.
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> [53] *Of course, such a situation can arise where the Legislature of a state makes law that infringes on matters within the Federal List I am quite sure that there are such laws made by the Legislatures of the states after the introduction of cl (1A) of art 121 even though I shall refrain from mentioning them in this judgment. In such a situation the civil court will be asked to apply the provision of cl (1A) of art 121 to exclude the jurisdiction of the civil court. The civil court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts. The Qqestion to be asked is: are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide — art 128.* (Emphasis added.)

[13] This passage in *Latifah bte Mat Zin* cannot be read as diluting or overruling *Lina Joy* as suggested by counsel for the plaintiff. It merely says art 121(1A) is not meant to exclude the jurisdiction of the civil court, where such jurisdiction exists. If a federal law is constitutional, and that is a matter for the civil court to decide, the jurisdiction is not ousted just because there might be a competing claim to jurisdiction by a Shariah Court. Where a subject matter is clearly something within the Shariah Court jurisdiction (apostasy;

determination who is a Muslim), the issue of the civil court having the jurisdiction to decide on constitutionality does not arise.

[14] Given the authority of *Lina Joy*, and given the essential subject matter of this action being apostasy, this was a clear case of allowing the defendant's application under O 18 r 19(1)(d). The plaintiff's case was obviously unsustainable and warranted striking out with costs.

[15] This court is obviously bound by the clear ruling in *Lina Joy* as a matter of judicial precedent.

Appeal allowed.

Reported by Kanesh Sundrum